Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

B.D.S.D.,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Fourteenth District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Texas violated Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution by refusing to conduct a statutorily mandated investigation into the potential sexual exploitation of Petitioner before adjudicating her as a juvenile delinquent for the offense of prostitution.

2. Whether the Texas Court of Appeals erroneously limited the scope of protection under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as applied to juvenile proceedings to the specific procedures at issue in *In re Gault* and *In re Winship*.

LIST OF PARTIES IN PROCEEDING BELOW

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[1] Because this Petition arises from a juvenile court proceeding, Petitioner will be identified only by an alias In addition, Petitioner's full name has been redacted from documents included in the appendix. *See* TEX. R. APP. P. 9 8(c)

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OPINION BELOW

The opinion of the Texas Court of Appeals for the Fourteenth District (App. 1a-20a) is reported at 289 S.W.3d 889. The orders of the Texas Supreme Court denying Petitioner's petition for review (App. 46a) and denying Petitioner's motion for rehearing (App. 47a) were not published. The 315th District Court of Harris County, Texas, did not issue an opinion but signed a Judgment/Order adjudicating Petitioner as having engaged in delinquent conduct for the offense of prostitution. (App. 37a-45a)

JURISDICTION

The Texas Court of Appeals for the Fourteenth District rendered its judgment and issued an opinion on June 18, 2009. (App. 1a-20a) The Texas Supreme Court denied Petitioner's petition for review on February 12, 2010. (App. 46a) The Texas Supreme Court denied Petitioner's timely motion for rehearing on May 7, 2010. (App. 47a) The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part as follows: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner, a sixteen-year old child, was arrested and charged as a juvenile with the offense of prostitution. Petitioner was transported to the Harris County, Texas, juvenile detention center, where she advised a juvenile probation officer that she had run away from her mother's home and, at that time, was living with an adult male whose name she chose not to disclose. (App. 2a) According to the Juvenile Probation Report prepared by the State of Texas, Petitioner had been on runaway status for "several months," was not currently enrolled in school, and reported having "no friends." In addition, the Harris County Intake Department reported making "[s]everal attempts" to contact Petitioner's mother that "have gone unanswered." During the initial detention hearing, and outside of Petitioner's presence, Petitioner's counsel raised the concern that, based on the State's report, no investigation had been made as to whether someone was causing Petitioner to commit prostitution, which could entitle her to immunity. (*See* 30a-31a) Rather than investigate the potential sexual exploitation of Petitioner by the unknown adult male with whom she was living, the State of Texas elected to proceed against the child as an offender on the charge of prostitution.

Instead of undergoing a public trial, Petitioner agreed to plead "true" before the Honorable Michael H. Schneider, Jr., District Judge of the 315th District Court, Harris County, Texas, and went before the trial court for punishment based on an agreed recommendation. Following Petitioner's plea, the trial court found that Petitioner had engaged in delinquent conduct and placed her on probation for one year.

(App. 37a-45a) On November 20, 2007, Petitioner filed an amended motion for new trial arguing, *inter alia*, that the State's adjudication of Petitioner for the offense of prostitution after refusing to investigate her potential exploitation violated her right to due process under the United States Constitution. (*See* App. 53a-59a) At a December 13, 2007 hearing on Petitioner's motion for new trial, counsel for Petitioner asked the State to investigate whether Petitioner was being "compelled"[2] to commit the act of prostitution and whether she may have been a victim of sexual exploitation. (*See* App. 23a-36a) On behalf of the State of Texas, the district attorney refused, arguing that "there is no mandate for the State to investigate. It is not the State's duty to investigate whether or not someone is compelled." (App. 32a) The State further insisted that Petitioner "may be perfectly happy where she is"—*i.e.*, incarcerated. (App. 28a) The district court denied Petitioner's motion for new trial but granted her permission to appeal. (App. 21a-22a)

On appeal, Petitioner argued that her adjudication without any investigation by the State of Texas as to whether she was caused by any means to commit prostitution violated her right to due process. (*See* App. 4a) The Texas Court of Appeals for the Fourteenth District affirmed the trial court's judgment and issued its opinion on June 18, 2009. (App. 1a-20a) The Texas Supreme Court denied the petition for

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[2] Under the Texas Penal Code, a person commits the offense of "compelling prostitution" if the person knowingly "causes by any means a child younger than 18 years to commit prostitution." TEX PENAL CODE § 43.05(a)(2). In other words, the offense of "compelling" prostitution does not require proof of force, threat, or fraud if it involves a child under 18.

review, and later denied Petitioner's motion for rehearing. (App. 46a, 47a)

REASONS FOR GRANTING THE WRIT

Petitioner, a sixteen-year-old girl, was prosecuted by the State of Texas for prostitution and treated as a juvenile offender without any investigation into the probability that she was a victim of sexual exploitation. Texas's actions violated its own law and Petitioner's right to the protections of constitutional due process. This case of apparent first impression will affect and clarify the scope of due process protections for thousands of juveniles and potential child victims of sexual exploitation being handled by state law enforcement officers and prosecutors. This case may impact "[b]etween one and one and a half million children [who] are runaway/thrown away each year," and who are vulnerable to sexual exploitation. Suzanne L. Tiapula & Allison Turkel, *Identifying The Victims of Human Trafficking*, 42 THE PROSECUTOR 10, 10 (April/May/June 2008).

I. The juvenile court adjudication of Petitioner for prostitution did not measure up to the essentials of due process and fair treatment because the State of Texas did not conduct any investigation into the potential sexual exploitation of Petitioner.

Despite the hybrid civil/criminal nature of a juvenile adjudication, the Constitution requires that the proceeding measure up to "the essentials of due process and fair treatment." *In re Gault*, 387 U.S. 1, 30-31 (1967). The Due Process Clause of the Fourteenth Amendment entitles individuals to

protection against government action through both "substantive due process" and "procedural due process." *United States v. Solerno*, 481 U.S. 739, 746 (1987). At a minimum, due process requires that the State's actions be "consistent with the fundamental principles of liberty and justice." *Buchalter v. New York*, 319 U.S. 427, 429 (1943). In addressing Petitioner's due process challenge, the Court must consider the different policies that are relevant and applicable under Petitioner's circumstances. *See Lassiter v. Dep't of Social Servs. of Durham County*, 452 U.S. 18, 24-25 (1981) ("Applying the Due Process Clause is . . . an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.").

A. Texas had a statutory duty to investigate the circumstances surrounding Petitioner.

At the age of sixteen, Petitioner approached an undercover police officer on the streets of Houston and agreed to have sex for a fee. This fact pattern alone constitutes suspicion of child abuse under the Texas Family Code. *See* TEX. FAM. CODE § 261.001(1)(E) (defining "abuse" to include "sexual conduct harmful to a child's mental, emotional, or physical welfare"); *see also id.* § 101.003(a) (defining "child" as an unmarried person under eighteen). The State of Texas subsequently learned that Petitioner was a runaway and was living with an unidentified adult male. But despite these known facts, the district attorney refused to conduct any investigation into the possibility that Petitioner was being sexually exploited. To the contrary, the district attorney took the position that it

had no obligation to investigate: "[T]here is no duty for the State to investigate. It is not the State's duty to investigate whether or not someone is compelled."

The district attorney is wrong: Texas law mandates an investigation where there are facts creating a suspicion of abuse. Under the Texas Family Code, a person with knowledge of facts to support a belief that a child's physical or mental health or welfare has been adversely affected by abuse or neglect "shall immediately make a report," TEX. FAM. CODE § 261.101(a), and provide that report to "any local or state law enforcement agency" or other group specified by statute. *Id.* § 261.103(a); *see also In the Matter of B.W.*, 53 Tex. Sup. J. 854, 2010 Tex. LEXIS 446, at *19 (June 18, 2010). This reporting obligation applies "without exception," even to a person whose communications with the child may otherwise be privileged. TEX. FAM. CODE § 261.101(c). Moreover, failure to report such facts is a criminal offense. *Id.* § 261.109.

Law enforcement or another appropriate agency "*shall* make a prompt and thorough investigation of a report of child abuse." *Id.* § 261.301(a) (emphasis added). "The primary purpose of the investigation shall be the protection of the child." *Id.* § 261.301(d). The investigating authority is required to make several determinations, including "(1) the nature, extent, and cause of the abuse or neglect; (2) the identity of the person responsible for the abuse or neglect; . . . (4) an evaluation of the parents or person responsible for the care of the child; . . . (6) the relationship of the child to the persons responsible for the care, custody, or welfare of the child; and (7) all other pertinent data." *Id.* § 261.301(e); *see also B.W.*,

2010 Tex. LEXIS 446, at *19 (interpreting the Texas Family Code as requiring a law enforcement or other governmental agency in receipt of a report of suspected abuse to "conduct an investigation during which the investigating agency may take appropriate steps to provide for the child's temporary care and protection"). Here, Texas's failure to conduct such an investigation was not a mere oversight; the State affirmatively refused to do so.

B. The power to determine Petitioner's fate rests exclusively in the hands of the State of Texas.

Petitioner was adjudicated as a juvenile for the offense of prostitution as set forth in section 43.02 of the Texas Penal Code.[3] Texas's failure to first conduct an investigation as required by Texas law did more than prevent Petitioner from obtaining the protection to which she was entitled—it also precluded her from any opportunity to receive immunity from prosecution. The Texas Penal Code in effect at the time made it a criminal offense if a person "causes by any means a person younger than 17 years to commit prostitution." TEX. PENAL CODE § 43.05(a)(2).[4] The State need not show that the offender used force, threats, or fraud—the standard is simply whether he or she

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[3] Texas has generally adopted offenses under the Texas Penal Code into the Juvenile Justice Code, which applies to children between 10 and 16. *See* TEX. FAM. CODE § 51.03(a)(1) ("Delinquent conduct is . . . conduct, other than a traffic offense, that violates a penal law of this state . . . .").

[4] Texas amended section 43.05 in 2009 to change the child's maximum age from 17 to 18.

"causes by any means" the child to commit the act of prostitution. *Id.*; *see also Waggoner v. State*, 897 S.W.2d 510, 512 (Tex. App.—Austin 1995, no pet.). Texas provides further protection for the child (and further incentive to pursue the "compeller") by providing immunity to individuals engaged in prostitution in exchange for any evidence or testimony against those who promote or compel their conduct. *See* TEX. PENAL CODE § 43.06(b). However, the power to invoke this immunity rests entirely in the hands of the State. Section 43.06 affords no opportunity for the Petitioner to assert immunity. Texas has complete discretion over whom it will target.

Fundamental principles of liberty and justice require that, before proceeding against Petitioner, depriving her of liberty and stigmatizing her as a prostitute, the State must conduct some investigation into the possibility that someone was promoting or otherwise causing her "by any means" to commit prostitution. Texas is required to conduct such an investigation under the Texas Family Code, and an investigation is the only means by which Petitioner might avail herself of immunity from prosecution under the Texas Penal Code. The decision to proceed against Petitioner under a charge of prostitution without conducting the statutorily mandated investigation does not meet the essentials of due process and fair treatment. This Court should grant certiorari to correct Texas's erroneous determination of Petitioner's constitutional rights and to protect countless other children from a similar deprivation of their rights.

II. The Texas Court of Appeals erroneously limited its analysis of a juvenile's due process protections to the specific procedural protections at issue in *Gault* and *Winship*.

The Texas Court of Appeals failed to analyze whether Petitioner's adjudication without any investigation into her probable sexual exploitation and statutory immunity violated her right to due process. Instead, the lower court improperly limited the due process protections available to Petitioner to the specific procedural protections that were at issue in *Gault* and *In re Winship*, 397 U.S. 358 (1970). The lower court stated that "[u]nlike the juveniles in *In re Gault* and *In re Winship*, [Petitioner] does not allege, nor does the record reflect, that she was denied any of the applicable procedural safeguards that due process requires for adjudicating a juvenile." (App. 17a) In so doing, the lower court limited the scope of due process protection for juvenile proceedings to "proper notice of the charges, the right to counsel, the privilege against self-incrimination, . . . the right to confrontation," and proof "beyond a reasonable doubt." (*Id.*)

This Court did not limit the application of due process to only those specific procedural requirements. This Court expressly stated in *Gault*: "We do not in this opinion consider the impact of these constitutional provisions [the Fourteenth Amendment and the Bill of Rights] upon the totality of the relationship of the juvenile and the state. We do not even consider the entire process relating to juvenile 'delinquents.'" *Gault*, 387 U.S. at 13. This Court could have limited due process to juveniles in the manner suggested by the lower court, but it did not. Instead, the Court pronounced that any juvenile court adjudication "must

measure up to the essentials of due process and fair treatment." *Id.* at 30-31. Petitioner's case presents the scenario that this Court envisioned when it extended an adult's constitutional protections to juveniles through the flexible vehicle of due process: "[T]he Due Process Clause has a role to play. The problem is to ascertain the precise impact of the due process requirement upon such proceedings." *Id.* at 13-14.

The lower court failed to address the intertwining effect of applicable Texas statutory provisions (the investigation requirement under the Texas Family Code and immunity from prosecution for prostitution under the Texas Penal Code) in determining if the State's adjudication of Petitioner, a sixteen-year-old child, afforded her the essentials of due process and fair treatment. First, unlike the situations in *Gault* and *Winship*, no applicable procedural safeguard afforded to adults needs to be extended to juveniles in this case. Petitioner's complaint is that the State failed to extend a safeguard that Texas law uniquely affords *children* engaged in the conduct at issue by defining such conduct as "abuse" of a child. Second, the lower court failed to recognize or address any of the interests at stake to determine whether Petitioner was denied the essentials of due process and fair treatment as a result of Texas's failure to conduct the statutorily required investigation. *See Lassiter*, 452 U.S. at 24-25. This Court should grant certiorari to clarify the extent of due process protections available for juveniles, consistent with its pronouncement in *Gault*.

III. Texas's approach to children engaged in acts of prostitution as approved by the lower court will likely impede national and international efforts against human trafficking.

Human trafficking and the sexual exploitation of children is a world crisis. Protection of victims of sexual exploitation is a priority both in this country and throughout the world:

> On December 3, 2005, the United States formally joined ninety-four other countries as an official party to the [U.N. Protocol], . . . a multilateral component of the worldwide effort to combat modern-day slavery. It seeks to prevent trafficking, protect victims, and promote antitrafficking cooperation among governments. Consistent with the U.N. Protocol, the United States and other governments have developed antitrafficking programs which include the so-called "Three P's": prosecution of traffickers through enhanced penalties and investigative priorities, protection of victims, and prevention of future trafficking.

Cynthia Shepherd Torg, *Human Trafficking Enforcement in the United States*, 14 TUL. J. INT'L & COMP. L. 503, 503 (Spring 2006) (footnotes omitted).

In response to the growing problem of human trafficking, Congress passed the Trafficking Victims Protection Act of 2000 ("TVPA"). 22 U.S.C. §§ 7101-12. Among other things, the TVPA is designed to "provide protection and assistance for those who have been

trafficked, and strengthen prosecution and punishment of those responsible for trafficking." 146 CONG. REC. S7781 (2000) (statement of Sen. Wellstone). Although the TVPA generally makes assistance conditional on a person's assistance with the investigation and prosecution of those responsible for trafficking, there is no such condition on assistance if the victim is under the age of 18. *See* 22 U.S.C. § 7105(b)(1)(C). As one commentator notes, this provision is designed to counter "the issue of biased and insufficient grants of assistance that came from the prosecutor's discretion and level of interest in helping the victim." Shelby Schwartz, *Harboring Concerns: The Problematic Conceptual Reorientation of Juvenile Prostitution Adjudication in New York*, 18 COLUM. J. GENDER & L. 235, 255 (2008). Although the TVPA focuses on foreign-born children, it is inconceivable that the same protections are not available to children that are born in this country.

According to the Department of Health and Human Services, one of the biggest challenges to identifying victims of human trafficking is that law enforcement frequently views them first and foremost as criminals, not as victims:

> Another challenge to identifying victims is the lack of acknowledgment by some law enforcement and service providers that someone is a victim of trafficking. There were examples given of victims who were viewed first as undocumented, or illegal, immigrants and treated as criminals and subjected to deportation hearings. **In other cases, victims were viewed first as prostitutes and charged with solicitation and placed in jail**

> **or detention (even in cases involving minors). These cases serve to reinforce the message of traffickers that the victims will be treated as criminals if they come to the attention of authorities, buttresses the perception of victims that they are to blame, and enhances the power and control of traffickers over their victims.**

HEATHER J. CLAWSON & NICOLE DUTCH, U.S. DEP'T OF HEALTH & HUM. SERVS., IDENTIFYING VICTIMS OF HUMAN TRAFFICKING: INHERENT CHALLENGES AND PROMISING STRATEGIES FROM THE FIELD 3 (Jan. 2008) (emphasis added). Unfortunately, law enforcement's bias against viewing children engaged in the sex trade as victims rather than as offenders is still prevalent, as evidenced by Texas's actions in this case.

Human trafficking of children is a national crisis, and Houston, Texas, is a major hub of this activity. *See* HOUSE COMM. ON HUMAN SERVICES, Bill Analysis, Tex. C.S.H.B. 4009, 81st Leg., R.S. (2009). These are lost children. Regular citizens—teachers, doctors, neighbors, etc.— are frequently unable to report this type of abuse because the children are being harbored from the reach of law-abiding society. It takes undercover officers to infiltrate this exploitative world in order to find them. It violates traditional notions of due process and fairness to suggest that a child is only entitled to an investigation if a report is made *to* law enforcement, but not if the information is obtained directly *by* law enforcement. The age of the child and the known facts control, not the method in which these facts are discovered. Without guidance from this Court, Texas's approach of presumptively viewing the child as an offender, not a victim, will likely prevail,

hampering the nationwide and worldwide effort to stop human trafficking.

PRAYER

Petitioner respectfully requests that the Court grant certiorari, consider this case on the merits, and answer the questions presented.

Respectfully submitted,

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